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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO AVILA,

Defendant and Appellant

C058108

(Super. Ct. No. NCR70113)

The People charged defendant Julio Avila with murder, with an enhancement for the personal and intentional use of a firearm causing great bodily injury, and with felony street gang terrorism. Ultimately, he was found guilty of street gang terrorism and voluntary manslaughter, and the jury found he personally used a firearm.¹

¹ Defendant had two trials. His first jury found him guilty of street gang terrorism but deadlocked on the murder charge and its enhancement. The trial court accepted the guilty verdict on the street gang terrorism charge and declared a mistrial as to the murder charge. At a second trial on the murder charge and its enhancement, a second jury found defendant guilty of

On appeal, defendant argues: (1) ineffective assistance of trial counsel for counsel's failure to object to certain opinions proffered by a gang expert; (2) insufficient evidence to support the street gang terrorism conviction; and (3) improper application of the upper term for the firearm enhancement. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND²

On or about the evening of November 4, 2005, defendant's truck broke down on his way to visit a friend. Defendant decided to walk the rest of the way to his destination, and, en route, he was attacked by three or four members of the Sureño gang near the trailer home of a friend. Following the altercation, defendant went to a nearby acquaintance's home and obtained a gun. He then walked back to his truck with the gun, where he saw the truck's windows broken. Defendant left his truck to walk to a different friend's house, and as he was walking, he saw a car drive past him, stop, and then come back toward him. Seeing in the car Sureño gang members who had assaulted him earlier in the evening, defendant fired the gun

voluntary manslaughter and found true the personal use of a firearm enhancement allegation.

² Because the substantive issues raised on appeal stem from the street gang terrorism charge, the substantive facts of the incident are taken from the first trial, which resolved that charge. Facts related to the appeal on sentencing are taken from the end of the second trial when the trial court pronounced defendant's sentence.

twice at the car. One of the bullets struck and killed a passenger in the car.

Defendant was charged with murder, enhanced with the personal and intentional use of a firearm causing great bodily injury, and with street gang terrorism.

During the first trial, the prosecution called Eric Clay, an investigator in the Tehama County District Attorney's Office, as an expert on gangs. Investigator Clay testified to the nature and culture of gangs generally and to the history of the feud between the Norteño and Sureño gangs. He also testified that he believed defendant was a member of the Norteños at the time of trial and at the time of the shooting, contrary to defendant's assertions. He further testified he believed this shooting was gang related. As a basis for his conclusions, he testified defendant was wearing red shoelaces, an indication of Norteño affiliation, at the time of the shooting. He also testified he had reports from several police officers that defendant had admitted to membership in the Norteños in 2003 and 2005. He further testified he had seen additional reports that defendant had committed two crimes with another Norteño gang member. Additionally, he testified he had seen multiple letters from defendant indicating defendant's affiliation with the Norteños, including one that used the phrase "'us northern Hispanics,'" which he asserted was another means of referring to the Norteños. He also claimed defendant's tattoos and his moniker were indications of membership in the Norteño gang.

At trial, defendant admitted to having gang tattoos and writing the letter dated March 5, 2006, which referred to "'us northern Hispanics.'" However, he claimed he was not a member of a gang at the time of the shooting or at the time of trial.

The trial court sentenced defendant to 11 years for the voluntary manslaughter charge and the upper term of 10 years for the personal use of a firearm enhancement, justifying the use of the upper term by the gang-related nature of the crime. The court stayed the two-year sentence for the felony street gang conviction.

DISCUSSION

I

The Gang Expert's Testimony

Defendant contends his counsel was ineffective for failing to object to what he claims were two instances of improper expert witness testimony by Investigator Clay: (1) Clay did not believe defendant's assertion he was no longer in a gang at the time of the shooting and the reasons for Clay's opinion; and (2) Clay believed the shooting was gang related and the reasons he came to that conclusion. Below, we detail the full excerpts of the testimony with which defendant takes issue.

A

The Gang Expert's Statement He Did Not Believe

Defendant's Assertion He Was No Longer In A Gang

Defendant contends his counsel was ineffective for not objecting when the prosecutor asked the expert if he believed defendant's assertion he was no longer a gang member and the

expert testified that he did not find that statement accurate and then explained reasons why.

The exchange to which defendant objects was as follows:

"[PROSECUTOR:] [B]ased on your expertise and everything that you presented, do you believe his assertion that he was no longer involved in the gang?

"[EXPERT CLAY:] No, I don't believe that's accurate.

"[THE PROSECUTOR:] Why do you not believe that?

"[EXPERT CLAY:] Well, I believe it not to be true because of all of his activity. He's still wearing the gang colors the night of the event. The event involved rival gang members. There has been information since the incident where he's been still involved in gang activity.

"Gang members know that they get in more trouble being a gang member committing a crime, so they try to downplay to law enforcement their membership in that gang. But their actions speak louder than their words when they tell us they are not gang members anymore."

The problem with this testimony was twofold. One, the expert gave an opinion on whether defendant was accurate, i.e., truthful, in his testimony about whether he was involved in a gang. Questions about a defendant's veracity are improper subjects for expert witness testimony. (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 240-241.) Two, the expert gave an opinion on what he believed to be defendant's thought process, i.e., gang members try to downplay their involvement because they know they can get in trouble when they commit crimes as

gang members. Questions about a defendant's knowledge or intent are not the proper province of expert witness testimony.

(*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658; see *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550-1551.)

B

*The Expert's Statement He Believed The
Incident Was Gang Related*

Defendant contends counsel should have objected to the expert's testimony the shooting was gang related and the reasons he came to that conclusion. The testimony at issue was as follows:

"[THE PROSECUTOR:] Now, in your expert opinion do you believe the shooting of Alvaro Castillo involving the Defendant or caused by the Defendant was gang-related?

"[EXPERT CLAY:] Yes.

"[THE PROSECUTOR:] And how do you come to that conclusion?

"[EXPERT CLAY:] Well, first and probably the simplest is he was a rival gang member. The everyday life of a gang member is to hurt, kill, oppose the rival gang. The mere fact that these other individuals were rival gang members means that any assault against them was motivated because of the gang on both sides.

"Additionally, there's information that Mr. Avila had been having a conflict with Victor Martinez over at least a few weeks. There is also information that Mr. Avila's vehicle was vandalized, and he probably thought it was this group of individuals [who] did it.

"Therefore, because of an ongoing conflict between them, the fact that they are rival gang members, and that it would have been retaliation for what he thought, whether it was true or not, what he thought was vandalism to his vehicle by rival gang members, all of that would have been around gang motivation because of them being rival gang members and the retaliation and so on.

"If he did not retaliate or did not do something to this group of individuals, he would have lost respect within his own gang. And by doing this, it's just the opposite. He gained respect within his own gang."

There are at least two problems with this testimony. One, it again involves defendant's thought process, i.e., assaults are all motivated by gang membership. And two, the questioning asked the expert to determine if the facts at hand suggested gang-related activity, rather than providing the expert a hypothetical set of facts, and then asking for the expert's opinion, as the law requires. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1208-1209; see *People v. Gardeley* (1996) 14 Cal.4th 605, 619.)

C

Ineffective Assistance Of Counsel

Given these improper questions on direct appeal with a silent record, we must determine whether counsel was deficient for failing to object and whether any deficient performance was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693].)

Defendant fails on both prongs. First, on a silent record, we cannot say counsel's performance in failing to object was deficient because he may have had legitimate tactical reasons for his failure to do so. For example, he may not have wanted to highlight the objectionable testimony to the jury so he well may have decided it was not worth objecting. Furthermore, as to the difference between presenting the facts as a hypothetical and referring to the facts presented to the jury, counsel legitimately may have decided not to object because the expert here identified the underlying reasons for concluding the shooting was gang related. And by identifying the bases for his opinion, the jurors would have been able to discount his conclusion if they believed any of the underlying information untrue.

Second, even if counsel's failure to object was deficient, it was not prejudicial because the prosecution provided a great deal of other evidence from which the jury could have found defendant was an active member of the Norteños gang at the time of the shooting and the shooting was gang related. The prosecutor's evidence included the expert's testimony that defendant was a member of the Norteños. To support his conclusion, the expert referenced a letter from defendant confiscated by the Tehama County Probation Department where he sketched symbols meaning "Norteño for Life." The expert also testified defendant had admitted membership in the Norteños to the police in 2003 and in 2005. The expert witness had further

reports defendant had committed two other crimes with another member of the Norteños.

There was further testimony defendant was wearing red shoelaces at the time of his arrest, which the expert testified to be a common signifier of membership in the Norteños. The prosecution also entered into evidence a letter written several months following the incident, where defendant identified with "'us northern Hispanics,'" and the expert witness testified "northern Hispanics" is another term for Norteños. Furthermore, defendant had multiple tattoos the expert witness identified as markers of membership in the Norteños. Finally, the victims of the shooting were known members of the Sureños, a rival gang to the Norteños, between whom there had been a history of gang violence. These pieces of evidence provide the basis from which a rational trier of fact could deduce defendant was an active participant in the Norteños at the time of the shooting and the shooting was gang related, regardless of whether the expert opinion evidence defendant complains about on appeal was presented in the manner it was.

II

The Evidence Was Sufficient To Support The Street Gang Terrorism Conviction

Defendant argues the evidence was insufficient to support two essential elements of the street gang terrorism charge: his active participation in the gang at the time of the shooting and that the shooting was itself gang related. This court reviews a claim of insufficiency of the evidence to determine "whether any

rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) “The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

We disagree with defendant’s contentions. There is overwhelming evidence defendant was an active gang participant at the time of the shooting and the shooting was a gang-related activity such that a rational trier of fact could have found these elements true beyond a reasonable doubt. Defendant is correct in asserting that a street gang terrorism conviction requires active participation in the gang rather than passive membership. (*People v. Castaneda* (2000) 23 Cal.4th 743, 747-752.) However, the prosecutor provided significant evidence defendant was more than a passive member, which we have recounted already.

Defendant attempted to refute this evidence of active participation in the Norteños by claiming he had previously associated with them but had not been at the time of the shooting or at the time of trial. However, the letter referring to “‘us northern Hispanics’” was dated March 5, 2006, postdating the shooting by several months. Further, the red shoelaces were worn the day following the shooting.

There is also overwhelming evidence defendant's activity was gang-related. First, a gang expert testified this was a gang-related activity and grounded that conclusion in facts largely undisputed by defendant. Additionally, the prosecution produced testimony that defendant was a member of the Norteños gang, that the victims in the shooting were members of the Sureños, a rival gang, and that the Norteños and Sureños were in a gang war. These facts provide a sufficient basis for a rational trier of fact to deduce the shooting was a part of the gang war between the Sureños and Norteños and was therefore gang-related activity.

III

The Sentence Was Appropriate

Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], defendant argues the trial judge improperly sentenced him to the upper term on the personal use of a firearm enhancement to the voluntary manslaughter conviction. He argues this imposition of the upper term was invalid because the trial court based its decision on the conviction for gang-related terrorism from the first trial, which he argues was insufficiently supported. Because we conclude the evidence was sufficient to support the gang-related terrorism conviction, there is an adequate basis under *Apprendi* to support the enhancement. The People are correct that this one aggravating circumstance, proved to a jury beyond a reasonable doubt, is

sufficient to sustain the upper term. (See *People v. Black*
(2007) 41 Cal.4th 799, 813.)

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.